IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

J.C. WHITNEY & CO.,	)	
	)	
Plaintiff,	)	
	)	No. 99 C 3714
v.	)	
	)	Magistrate Judge Schenkier
RENAISSANCE SOFTWARE CORPORATION, ROBERT J. SALTZMAN, and JOHN JACKSON,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

On January 30, 1998, J.C. Whitney & Co. ("Whitney"), a Delaware corporation with its principal place of business in Illinois, entered into a Products and Services Agreement ("the Agreement") with Renaissance Software Corporation ("Renaissance"), a Massachusetts corporation with its principal place of business in Massachusetts. Under the Agreement, Renaissance agreed to provide Whitney with software and related maintenance and support for use in Whitney's business as an automotive parts supplier.

Whitney became disenchanted with Renaissance's performance of the Agreement and, on June 4, 1999, filed a nine-count diversity complaint against Renaissance alleging a variety of contract-based theories as well as one count alleging a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1-12. The ICFA claim against Renaissance was (and is) based on an array of allegedly fraudulent and material misstatements and omissions by John Jackson, then the President of Renaissance (Compl., Count IV, ¶¶ 7.A.-7.N.). Renaissance did not seek to dismiss any of those claims, including the ICFA claim, but instead filed an answer.

Thereafter, on December 26, 1999, Whitney sought leave to amend the complaint to add two counts against two new parties: an ICFA claim (Count X) and a common-law fraud claim (Count XI) against both Mr. Jackson and Robert S. Saltzman, who is alleged to have been the Chief Executive Officer of Renaissance at the relevant time. Both Messrs. Saltzman and Jackson are Massachusetts residents (Amended Compl. Count X, ¶¶ 1-2), and subject matter jurisdiction of these new claims also is based on diversity of citizenship. The statutory and common-law fraud claims reassert the alleged misstatements and omissions by Mr. Jackson that are the basis of the ICFA claim against Renaissance, and seek to impose personal liability on Messrs. Jackson and Saltzman on the grounds that by virtue of their ownership and executive positions, Messrs. Saltzman and Jackson completely controlled Renaissance's activities (Am. Compl., Count X, ¶¶ 16, 19, 24); that Mr. Saltzman participated in and/or approved of the alleged fraudulent misstatements and omissions by Mr. Jackson, and that the two of them were engaged in a fraudulent scheme directed at Whitney and other software consumers (*id*., ¶¶ 18, 20, 24); and that they personally profited from the fraudulent conduct (*id*., ¶ 22).

The Court allowed Whitney to file the amended complaint and to serve it on the new parties, over Renaissance's objection, but allowed Messrs. Saltzman and Jackson to move to dismiss the claims against them. That they have done, and it is the separate but virtually identical motions to dismiss by Messrs. Saltzman [doc. #24-1] and Jackson [doc. #27-1] that now bring this matter before the Court.[1]

Messrs. Saltzman and Jackson each argue that this Court must dismiss the claims against them on the grounds that this Court lacks personal jurisdiction over them, that Whitney's common-law fraud and

[1]Mr. Saltzman is represented by the same lawyers who represent Renaissance. Mr. Jackson is proceeding pro se, but his motion papers plainly "tag along" with the arguments and authorities offered by Mr. Saltzman's counsel.

ICFA claims are legally insufficient, and that venue is not proper. In the alternative, Messrs. Saltzman and Jackson argue that if any claims against them survive dismissal, the case (or at least the portion of the case against them) should be transferred to the District of Massachusetts. For the reasons set forth below, Messrs. Saltzman's and Jackson's motions to dismiss or transfer are denied.

I.

The purpose of a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6) is to test the sufficiency of the complaint, and not to decide the case on the merits. *See Weiler v. Household Fin. Corp.*, 101 F3d 519, 524 n.1 (7th Cir. 1996). A court must construe the allegations in the light most favorable to the plaintiff; all well-pleaded facts and allegations must be taken as true. *See Bontkowski v. First Nat'l Bank of Cicero*, 998 F.2d 459, 461 (7th Cir. 1993). While the complaint must allege facts sufficient to establish the essential elements of the cause of action, *see Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir. 1992), a court should not dismiss the complaint "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In applying that test, a Court may consider "essential facts" submitted during the briefing, even if not in the complaint, so long as they are "consistent with the allegations in the complaint." *Hentosh v. Herman M. Finch Univ. of Health Sciences*, 167 F.3d 1170, 1173 n.3 (7th Cir. 1999).

Where a motion to dismiss asserts lack of personal jurisdiction, the plaintiff has the burden to make a prima facie showing that personal jurisdiction exists. *See Jones v. Sabis Educ. Sys., Inc.*, 52 F. Supp. 2d 868, 883 (N.D. Ill. 1999). All well-pleaded facts in the complaint are accepted as true, unless they are controverted by the defendant's affidavits. *See id.* However, where conflicting affidavits are submitted by

both parties, "all factual disputes must be resolved in favor of the plaintiff." *Ozonology Inc. v. Campbell*, No. 96 C 6630, 1998 WL 704161, at *3 (N.D. Ill. Sept. 24,1998).

Mindful of these standards, the Court addresses in turn the motions to dismiss based on lack of personal jurisdiction (Part II) and on the merits (Part III).

II.

Federal courts sitting in diversity in Illinois have personal jurisdiction over a party only if an Illinois state court would have personal jurisdiction, which, in turn, is only proper if the exercise of personal jurisdiction would comport with both the Illinois and federal constitutions. *See Sabis*, 52 F. Supp. 2d at 883. Thus, a plaintiff must establish (1) that the federal court has personal jurisdiction under Illinois law, and (2) that the exercise of jurisdiction will not offend federal due process. *See Brandon Apparel Group, Inc. v. Quitman Mfg. Co., Inc.*, 42 F. Supp. 2d 821, 828 (N.D. Ill. 1999).

Messrs. Jackson and Saltzman both argue that Whitney has failed to establish that they had minimum contacts with Illinois. In addition, both invoke the "fiduciary shield" doctrine which, they argue, "protects non-resident defendants from being sued in Illinois even when those defendants engage in tortious acts in Illinois on behalf of an employer and not for their personal benefit" (Saltzman Mem. at 6; Jackson Mem. at 6).

For its part, Whitney argues that this Court has personal jurisdiction over Mr. Jackson, as the amended complaint alleges that Mr. Jackson personally made fraudulent misstatements and omissions to the plaintiff while Mr. Jackson was in Illinois. As to Mr. Saltzman, plaintiff argues that he is subject to personal jurisdiction in Illinois because he allegedly engaged in a fraudulent scheme with Mr. Jackson, whose conduct may thus be imputed to Mr. Saltzman. Plaintiff further argues that the fiduciary shield

doctrine does not protect either Mr. Jackson or Mr. Saltzman because each was a corporate officer of Renaissance "in a position to decide whether the minimum contact with the State of Illinois should be made," each made a conscious business decision to conduct business with Whitney in Illinois, and each benefitted from the Illinois contacts as the sole shareholders of Renaissance (Pl's. Mem. 25).

The Court examines the question of personal jurisdiction as to Mr. Jackson and Mr. Saltzman in turn, and finds that personal jurisdiction exists as to each of them.

A.

The amended complaint alleges that in January 1998, Mr. Jackson made some fourteen fraudulent misrepresentations to Whitney (Am. Compl., Count IV, ¶ 7.A.-7.N., incorporated by reference into Counts X and XI).[2] According to the amended complaint, Mr. Jackson knew that his representations were false (*id*., Count X, ¶¶ 9, 25; Count XI, ¶ 35). Mr. Jackson allegedly made those representations while he was at Whitney's Illinois offices, in an effort to induce Whitney into entering into the Agreement (Am.

[2]Specifically, the amended complaint alleges that Mr. Jackson: (1) falsely represented to Mr. Ford and Mr. Murray that Renaissance had the ability to perform as project manager to properly install the software to accommodate Whitney's business needs; (2) falsely informed Mr. Ford and Mr. Murray that the software was a "tested and proven" product, capable of being modified to meet Whitney's business needs; (3) falsely told Mr. Ford and Mr. Murray that the software could be modified within two months, or less; (4) falsely informed Mr. Ford and Mr. Murray that there were "no issues" between Mr. Jackson and Mr. Saltzman that would interfere with the software implementation; (5) falsely informed Mr. Ford and Mr. Murray that Jackson would be the project manager; (6) falsely told Mr. Ford and Mr. Murray that Renaissance managed versions of the software code, and that it would modify the code to ensure security and control of the software; (7) falsely told Mr. Rovansek and Mr. Murray that the software supported Whitney's "core business functions"; (8) falsely told Mr. Rovansek and Mr. Murray that Renaissance would establish and connect to Whitney's computer system and database server to assist in making modifications; (9) falsely told Mr. Ford and Mr. Murray that Renaissance "strictly" followed accepted industry management practices used to manage projects and timelines in connection with parts of the software system being sold to Whitney; (10) falsely told Mr. Ford and Mr. Murray that the software "properly accounted" for certain types of customer transactions; (11) falsely told Mr. Ford and Mr. Murray that the software "conformed to current credit card transaction standards"; (12) falsely told Mr. Ford and Mr. Murray that Renaissance would provide maintenance releases of certain software: (13) falsely told Mr. Ford and Mr. Murray that Renaissance would provide support after the software was installed, and failed to tell Mr. Ford or Mr. Murray that Renaissance was not qualified to provide such support; and (14) Mr. Jackson failed to disclose to Mr. Ford or Mr. Murray that Renaissance was "not qualified" to "perform the programming, installation, implementation and testing" of the software to "accommodate [Whitney's] business requirements and operating procedures."

Compl. Count X, ¶ 26; Count XI, ¶¶ 34, 36; Pl's. Mem., Affidavit of Thomas Murray, ¶¶ 7-8). Thus, the issue before this Court is whether those activities subject Mr. Jackson to personal jurisdiction under the Illinois and federal constitutions.

1. Illinois Law

Under the Illinois long-arm statute, a person is subject to the jurisdiction of the courts of Illinois if, in person or through an agent, he or she engages in the "commission of a tortious act within this State." 735 ILCS 5/2-209(a)(2); *see also Brujis v. Shaw*, 876 F. Supp. 975, 977 (N.D. Ill. 1995). The allegations of the amended complaint plainly assert that Mr. Jackson committed a tortious act in Illinois in January 1998, by allegedly making affirmative misstatements and affirmatively concealing the truth about material matters (Am. Compl., Count IV, ¶ 7.A.-7.N.). There can be no doubt that this prong of the personal jurisdictional analysis under Illinois law is met.[3]

However, that does not end the inquiry because, under Illinois law "[j]urisdiction is to be asserted only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois." *Rollins v. Ellwood*, 565 N.E.2d 1302, 1316, 1318 (Ill. 1990); *see also RAR*, 107 F.3d at 1276. In *Rollins*, the Illinois Supreme Court formally recognized the "fiduciary shield doctrine," which in some circumstances will prevent Illinois courts from exercising personal jurisdiction over a person acting on behalf of an employer. Mr. Jackson argues that the fiduciary shield doctrine requires this Court to find

[3]As a result, the Court need not consider the "catchall" provision under the long-arm statute, which provides that "[a] court may also exercise jurisdiction on any other basis now ... permitted by the Illinois Constitution and the Constitution of the United States," 735 ILCS 5/2-209(c); *see also RAR, Inc. v. Turner Diesal*, 107 F.3d 1272, 1276 (7th Cir. 1997); *Brandon*, 42 F. Supp. 2d at 828.

that he is not subject to personal jurisdiction in Illinois because "the Illinois Supreme Court has held that the Illinois Constitution protects non-resident defendants from being sued in Illinois even when those defendants engage in tortious acts in Illinois on behalf of an employer and not for their personal benefit" (Jackson Mem. at 6). However, the Court disagrees with Mr. Jackson's suggested application of *Rollins*.

In *Rollins*, the Illinois Supreme Court held that a Maryland police officer who had traveled to Illinois to take custody of the plaintiff was not subject to personal jurisdiction in Illinois. *See Rollins*, 565 N.E.2d at 1318. The *Rollins* court observed that the officer was not in Illinois serving his personal interests, but rather on orders from his employer. *See Id.* In those circumstances, the officer had "little or no alternative" besides unemployment to following the orders of his superiors. *See id.* The court reasoned that it would be "unfair and unreasonable ... to assert personal jurisdiction over an individual who seeks the protection and benefits of Illinois law, not to serve his personal interests, but to serve those of his employer or principle." *Id.*

In short, *Rollins* focused on (1) whether the defendant was serving his own interests in Illinois, and (2) whether the defendant exercised discretion as to his actions. It is clear that under *Rollins*, those factors weighs heavily in determining whether it would be fair and reasonable under Illinois due-process principles to exercise personal jurisdiction. And, indeed, a number of cases have held that the presence of those factors will result in the defendant being stripped of the fiduciary shield. *See, e.g., Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 912 (7th Cir. 1994) ("The [fiduciary] shield is withdrawn if the agent was acting also or instead on his own behalf–to 'serve' his personal interests"); *Vance v. National Benefit Assoc.*, No. 99 C 2627, 1999 WL 731764, at *2 (N.D. Ill. Aug. 30, 1999) ("[T]he fiduciary shield doctrine does not apply to senior corporate officers who are in a position to decide whether a corporation

will conduct business in the state."); *Fountain Mktg. Group, Inc. v. Franklin Progressive Resources, Inc.*, No. 96 C 2647, 1996 WL 406633, at *4 (N.D. Ill. July 16, 1996); *Brujis*, 876 F. Supp. at 979-80. Some courts add a third factor to the mix, namely, the extent to which a corporate employee or officer owns the corporation. *See, e.g., Brujis*, 876 F. Supp. at 980. That latter factor, although not specifically discussed by the *Rollins* court, is relevant to the two factors upon which *Rollins* focused: whether the defendant acted with discretion (which is more likely if the defendant is an owner of the business), and to whether the defendant was serving his or her own interests (which again is more likely if the defendant is the principal or sole owner of the company). *See., e.g, Fountain Mktg.*, 1996 WL 406633, at *4; *Brujis*, 876 F. Supp. at 980.

All three factors have been alleged against Mr. Jackson. Mr. Jackson was president of Renaissance, and one of only two shareholders of the company. Consequently, it is fair to infer for present purposes that -- as the amended complaint in fact alleges -- he was not compelled to make the misrepresentations to Whitney, but did so as a discretionary act. *See Vance*, 1999 WL 731764, at *2; *Telular Corp. v. Vitech America, Inc.*, No. 96 C 4749, 1996 WL 616590, at *4 (N.D. Ill. Oct. 21, 1996) (holding that high-ranking corporate official's actions were voluntary even though official was not an owner of the corporation).[4] Moreover, as one of two shareholders, it is fair to infer that -- as the amended complaint alleges -- Mr. Jackson's activity was for his benefit. *See, e.g., Scott v. Universal*

[4]Defendants question whether discretion is properly considered as a factor in addressing the fiduciary shield doctrine. *See, e.g.*, Saltzman's Mem. at 6 n.4 (citing dictum in *Glass v. Kemper Corp.*, 930 F. Supp. 332, 341 (N.D. Ill. 1996)). It is clear, however, that the lack of discretion was a key factor in the *Rollins* court's conclusion that the officer was not subject to personal jurisdiction. *See Rollins*, 565 N.E.2d at 1318 (observing that the officer had "little or no alternative" when ordered to enter Illinois and arrest the plaintiff). Thus, this Court finds that the level of the defendant's discretion is a factor to be considered in determining the applicability of the fiduciary shield.

Fidelity Corp., 98 C 3659, 1999 WL 684122, at *7 (N.D. Ill. Aug. 30, 1999) (noting that sole-shareholder of corporation "personally profits when [the corporation] profits"); *Fountain Mktg.*, 1996 WL 406633, at *4 ("[A]n individual who is a high-ranking company officer or shareholder has a direct financial stake in the company's health and can be subjected to personal jurisdiction for actions that result in both personal and corporate benefit."); *Brujis*, 876 F. Supp. at 980. The fiduciary shield doctrine does not protect Mr. Jackson from the exercise of personal jurisdiction under Illinois law, and this Court therefore will turn its attention to the analysis required under the federal due-process clause.[5]

2. United States Constitution

Under federal due process, a court sitting in Illinois may exercise personal jurisdiction over a defendant only if the defendant has "certain minimum contacts with [Illinois] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also RAR, Inc.*, 107 F.3d at 1277; *Darovec Mktg. Group, Inc. v. Bio-genics, Inc.*, 42 F. Supp. 2d 810, 820 (N.D. Ill. 1999). Thus, two requirements must be met before an Illinois court may exercise personal jurisdiction over a defendant: (a) the defendant must have "minimum contacts" with Illinois; and (b) the exercise of personal jurisdiction must not offend "traditional notions of fair play and substantial justice." *Logan Prods., Inc. v. Optibase, Inc.*, 103 F.3d 49, 52 (7th Cir. 1996); *Brandon*, 42 F. Supp. 2d at 829; *Telular Corp.*, 1996 WL 616590, at *2.

[5]In *Clipp Designs, Inc. v. Tag Bags, Inc.*, 996 F. Supp. 766, 768-69 (N.D. Ill. 1998), a case not cited by either individualdefendant, the district court dismissed the complaint as to the president and sole shareholder of the defendant corporation under the fiduciary shield doctrine, stating that the complaint failed to allege that the defendant corporation was a "sham" corporation, or that the defendant-president was the corporation's "alter ego." However, this Court finds nothing in *Rollins* requiring a plaintiff to use the words "alter-ego" or "sham" in order to defeat the fiduciary shield doctrine.

a. Minimum Contacts

Minimum contacts exist when a defendant "'has purposefully availed [himself] of the privilege of conducting activities'" in Illinois such that the defendant "'should reasonably anticipate being haled into [an Illinois] court.'" *RAR,* 107 F.3d at 1277 (citations omitted);*Telular Corp.*, 1996 WL 616590 at *2. The "purposeful availment requirement is designed to prevent defendants from being haled into court solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts with the forum state." *Logan Prods.*, 103 F.3d at 52.

The amended complaint alleges conduct by Mr. Jackson that was not random, fortuitous, or attenuated, but instead "reflected a purposeful effort to obtain [Whitney's] business," *Mid- America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1361 (7th Cir. 1996) -- business that Mr. Jackson knew was in Illinois, and that Mr. Jackson knew would be affected in Illinois. There is no doubt that if true -- and at this stage this Court must assume they are -- the allegations of the amended complaint demonstrate that Mr. Jackson's contacts with Illinois were more than enough to satisfy the minimum contacts requirement. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (holding that even when actions of defendant occurred out of the forum state, minimum contacts existed, and stating "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there"); *Nucor Corp. v. Aceros y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 581 (7th Cir. 1994) (holding that defendant was properly subject to personal jurisdiction after one meeting in the forum state, and stating that "a defendant's participation in substantial negotiations conducted in the forum state leading to the contract at issue is a significant basis for personal jurisdiction"); *Club*

Assistance Program, Inc. v. Zukerman, 594 F. Supp. 341, 346-48 (N.D. Ill. 1984) (holding that misrepresentations made to Illinois corporation by defendant corporate officer, with the knowledge and approval of two other defendant corporate officers, was enough to subject other officers to personal jurisdiction in Illinois).

b. Traditional Notions of Fair Play and Substantial Justice

After minimum contacts have been established, a defendant "can only escape jurisdiction by making a 'compelling case' that forcing [him] to litigate in [the forum] would violate traditional notions of fair play and substantial justice." *Logan Prods.*, 103 F.3d at 53 (quoting *Burger King*, 471 U.S. at 477). In making this determination a court should weigh a number of factors: (1) the burden on the defendant in litigating in the forum; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interests of the interstate judicial system in obtaining an efficient resolution of the controversy; and (5) the interests of the "several States in furthering fundamental substantive policies." *Mid-America Tablewares, Inc.*, 100 F.3d at 1362 (citing *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987)); *Logan Prods.*, 103 F.3d at 52; *Brandon*, 42 F. Supp. 2d at 831-31; *Switching Systems, Inc. v. C.M. Buck & Assocs., Inc.*, No. 97 C 1064, 1997 WL 403667, at *4 (N.D. Ill. July 16, 1997). In applying those factors, the Court must be mindful that the interests of the plaintiff and the forum state will "often justify even a serious burden on the nonresident defendant." *Brandon*, 42 F. Supp. 2d at 832.

Mr. Jackson has made almost no case, much less a compelling one, that it would be unfair to litigate in Illinois. It is clear that Illinois has a substantial interest in this case because Whitney is an Illinois corporation that is allegedly the victim of a fraud that occurred in Illinois. Moreover, Whitney has a

significant interest in having the litigation in Illinois because a number of potential witnesses presumably reside in or near this forum. At best, Mr. Jackson's argument boils down to the plea that it would be more convenient for him to litigate in Massachusetts since he resides there. However, "[w]hile there may be a case in which the inconvenience to the defendant is 'so substantial as to achieve constitutional magnitude,' [Jackson] has failed to show that this is such a case. . . . [and] has also failed to show that [his] claimed burden outweighs [Whitney's] interest in obtaining convenient and effective relief." *Brandon*, 42 F. Supp. 2d at 832 (citation omitted); *see also Mid-America Tablewares*, 100 F.3d at 1362 (holding that exercising jurisdiction over Japanese company in Wisconsin did not offend traditional notions of fair play and substantial justice); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 945 (7th Cir. 1992) (stating that journey from Kansas to Illinois "is not onerous" when company employees have made trip before for business purposes).

In addition, although Massachusetts may have some interest in preventing one of its citizens (Mr. Jackson) from having to litigate in a foreign state, Massachusetts' interests certainly do not outweigh Illinois' interests in preventing its citizens from being forced to litigate in a foreign state. Moreover, the defendants have not identified any Massachusetts substantive policy that would be harmed by litigation in this forum, and this Court does not believe that any such interest would be harmed. *Mid-American Tablewares*, 100 F.3d at 1362.[6]

[6]The interests of the interstate judicial system in obtaining an efficient resolution of the controversy is not significantly affected by having the case remain here. LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 166-67 tbl. C-5 (1999) (showing that the median times between filing to disposition in a civil case is roughly equivalent in the Northern District of Illinois and the District of Massachusetts).

The Court does not believe it offends traditional notions of fair play and substantial justice to require Mr. Jackson to defend this action in Illinois, the state where he is alleged to have made the misstatements that are a basis of the fraud claims. Thus, personal jurisdiction is supported under federal due process, as under the Illinois Constitution, and the motion by Mr. Jackson to dismiss for lack of personal jurisdiction is denied.

B.

The question of personal jurisdiction over Mr. Saltzman turns on the same legal principles previously discussed, but requires a somewhat different analysis because -- unlike the case with Mr. Jackson -- the amended complaint does not allege that Mr. Saltzman personally engaged in conduct in Illinois to induce Whitney to enter into the Agreement. Instead, the amended complaint alleges that Mr. Jackson's Illinois conduct in January 1998 may be imputed to Mr. Saltzman on the ground that they were jointly engaged in a "fraudulent scheme" (Am. Cmpl., Count X, ¶ 20); and that Mr. Saltzman "participated in and/or approved" the misrepresentations by Mr. Jackson (*id*., ¶ 18, 23).

1. Illinois Law

Mr. Saltzman's alleged conduct is sufficient to satisfy the requirements of the long-arm statute of the "commission of a tortious act within this state." 735 ILCS 5/2-209(a)(2). Mr. Saltzman argues otherwise, on the ground that tagging him with Mr. Jackson's Illinois conduct would improperly invoke a "conspiracy theory" of personal jurisdiction. This first argument fails.

The law is clear that when, as here, the defendant allegedly knew that the overt acts in furtherance of the conspiracy would occur in Illinois, "the conspiracy theory of jurisdiction is viable in Illinois.... if: (1) the defendant was part of an actionable conspiracy; and (2) a co-conspirator performed a substantial act

in furtherance of the conspiracy." *Markarian v. Garoogian*, 767 F. Supp 173, 179 (N.D. Ill. 1991); *see also Davis v. A & J Elecs.*, 792 F.2d 74, 76 (7th Cir. 1986); *Textor v. Board of Regents of Northern Illinois Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983); *Telular Corp.*, 1996 WL 616590, at *1-4 (fraudulent representations made by one corporate officer enough to subject corporation's chief executive officer to personal jurisdiction in Illinois when complaint alleged that both officers "conspired to obtain goods from [plaintiff] through fraud"); *Club Assistance*, 594 F. Supp. at 345-6; *Cleary v. Philip Morris, Inc.*, No. 1-99-0525, 2000 WL 294413, at *2 (Ill. App. Ct. 1st Dist. Mar. 17, 2000) (slip op.).

Mr. Saltzman does not appear to challenge this legal proposition, but rather argues that because "a conspiracy cannot exist between or among a corporation's own officers and employees" this Court cannot exercise personal jurisdiction over him (Saltzman Reply Mem., at 3). However, the mere fact that alleged coconspirators are officers of the same corporation does not necessarily defeat a claim that they conspired to commit a tort. *Telular Corp.*, 1996 WL 616590 at *1-4; *Club Assistance Program, Inc.*, 594 F. Supp. at 346. To be sure, there are Illinois cases that hold a corporation cannot conspire with its employees, *see, e.g. Small v. Sussman*, 713 N.E.2d 1216, 1221 (Ill. App. Ct. 1st Dist. 1999) and that, by extension, "no civil conspiracy can exist between or among the agents of such principal acting on its behalf." *Eisenhauer v. Stern*, No. 99 C 6422, 2000 WL 136011, at *1 (N.D. Ill., Jan. 27, 2000). But neither of those scenarios is alleged here: the amended complaint does not allege that either individual defendant conspired with Renaissance, or that they acted "on its behalf." Rather, the amended complaint alleges that Messrs. Saltzman and Jackson controlled the corporation, acted together in a scheme for their own benefit, and that Mr. Jackson attend the alleged misrepresentations in furtherance of the scheme. (Am. Compl., Count X, ¶¶ 18, 19, 22).

Moreover, Section 2/209(a) of the long-arm statute specifically provides that personal jurisdiction applies when there is commission in Illinois of a tortious act whether in person "or through an agent." This seems to contemplate the scenario alleged here, and to allow personal jurisdiction over both the person physically present (Mr. Jackson) in Illinois and the person outside of Illinois (Mr. Saltzman), who used the Illinois action as a medium for the alleged misconduct. Thus, the amended complaint adequately alleges a basis for the exercise of personal jurisdiction over Saltzman under Illinois law.[7]

Mr. Saltzman also argues that he is not subject to personal jurisdiction by operation of the fiduciary shield doctrine. However, as this Court observed above, *see supra* II.A.1., the fiduciary shield doctrine does not protect parties who exercised discretion regarding their Illinois contacts, and were serving their own interests. *See Brujis*, 876 F. Supp. at 980. Since the amended complaint alleges that Mr. Saltzman was one of two sole shareholders in the corporation and acted for his own benefit, and since the amended complaint can fairly be read as alleging that Mr. Saltzman (through Mr. Jackson) chose to make fraudulent misrepresentations to Whitney in Illinois, knowing that Whitney would suffer injury in Illinois, Mr. Saltzman can no more claim the protection of the fiduciary shield doctrine than can Mr. Jackson.

2. United States Constitution

Since the amended complaint alleges that Mr. Saltzman participated in a deliberate plan to defraud plaintiff, knowing that the fraud would take place in Illinois and affect economic interests in Illinois, it is clear

[7]Mr. Saltzman also argues that Whitney has not properly pled a "conspiracy theory" (Saltzman Reply Mem., at 3). While a count labeled "conspiracy" is not pled, the amended complaint alleges the necessary elements. *Canel and Hale, Ltd. v. Tobin*, 710 N.E.2d 861, 873 (Ill. App. Ct. 1st Dist. 1999). The amended compliant fairly alleges that Messrs. Saltzman and Jackson agreed to participate in an unlawful act by engaging in a scheme to defraud (Am. Compl., Count X, ¶¶ 7, 18, 20); committed overt acts in furtherance of the scheme (*id*., Count IV, ¶ 7); and that Whitney suffered injury as a result (*id*., Count X, ¶ 26).

that the amended complaint adequately alleges that Mr. Saltzman has consciously directed tortious activity towards Illinois. Under these circumstances, minimum contacts are adequately alleged, and Saltzman could "reasonably anticipate being haled into court" in Illinois.[8] *Markarian*, 767 F. Supp. at 179; *Club Assistance*, 594 F. Supp. at 348; *Cleary*, 2000 WL 294413, at *2-3 ("Surely those that join a conspiracy the purpose of which is to commit fraud ... in Illinois should, in some circumstances, reasonably foresee the possibility of being haled into court [in Illinois].") Moreover, for the reasons discussed above as to Mr. Jackson, *see supra* II.A.2.b., the exercise of personal jurisdiction over Mr. Saltzman will not offend traditional notions of fair play and substantial justice. *See also Markarian*, 767 F. Supp. at 179. Thus, as with Mr. Jackson, the motion to dismiss Mr. Saltzman from this case for lack of personal jurisdiction is denied.

III.

[8]Mr. Saltzman relies heavily on two cases in arguing that this Court does not have jurisdiction. Each is distinguishable. In *Steel Warehouse of Wisconsin, Inc. v. Leach*, 154 F.3d 712, 714-15 (7th Cir. 1998), the Seventh Circuit observed that because the plaintiff had failed to "indicate that the actions or omissions which [gave] rise to the allegations in the complaint" occurred within the forum state, the plaintiffs had failed to establish a prima facie case that the defendants were subject to personal jurisdiction. By contrast, the amended complaint here alleges conduct in Illinois by Mr. Jackson that, as we have explained above, may be imputed to Mr. Saltzman for purposes of personal jurisdiction. To the extent that Mr. Saltzman is arguing that, in order to exercise jurisdiction, this Court must find that he personally uttered the alleged misrepresentations, or that he was physically present in Illinois when the alleged misrepresentations were made, that argument finds no support in *Steel Warehouse* and, indeed, is contrary to Supreme Court authority. *See, e.g., Burger* King, 471 U.S. at 476; *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (holding that defendants need not be physically present in forum to justify exercise of personal jurisdiction); *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.2d 410, 411-12 (7th Cir. 1994).

In *Glass v. Kemper Corp.*, 930 F. Supp. 332, 339 (N.D. Ill. 1996), the court held that defendant's contacts with Illinois were not enough to confer jurisdiction. But, as the court observed, there were *no* Illinois contacts that gave rise to the claim; the false statements, reliance, and harm all occurred in Spain. In this case, however, the false statements, reliance, and harm all allegedly occurred in Illinois.

Whitney has asserted claims against both Saltzman and Jackson for common-law and statutory fraud. Messrs. Saltzman and Jackson both raise the same arguments in seeking to dismiss each of those fraud counts; we address each of the arguments in turn.

A. Common-Law Fraud

Illinois recognizes a common-law claim for fraud in the inducement. To establish that claim, a plaintiff must plead and prove that (1) the defendant made a false statement of material fact (as opposed to a mere promise or opinion as to the future), (2) the defendant knew the statement was false, (3) the statement was intended to induce another's reliance, (4) the statement did induce reasonable reliance, and (5) the statement caused damage to the party relying upon it. *Bell & Howell Fin. Servs. Co. v. St. Louis Pre-Sort, Inc,* No. 97 C 6063, 1999 WL 965961, at *1 n.3 (N.D. Ill. Sept. 29, 1999); *Damian Servs. Corp. v. White,* No. 96 C 8623, 1998 WL 596466, at *2 (N.D. Ill. Sept. 3, 1998); *Budget Rent A Car Corp. v. Geneys Software*, No. 96 C 0944, 1997 WL 201549, at *3 (N.D. Ill. Apr. 17, 1997).

Here, the amended complaint alleges each of those elements. The amended complaint alleges that Mr. Jackson made false statements and material omissions (Count IV, ¶ 7); that Mr. Saltzman also is responsible for these actions, as one who was in a common scheme with Mr. Jackson and participated in and/or approved of them (Count X, ¶¶ 18, 20); that Messrs. Jackson and Saltzman knew the statements to be false (Count XI, ¶ 35); that they intended Whitney to rely on them (*id*., ¶ 12); and that Whitney did so, to its detriment (*id*., ¶ 37). However, Messrs. Saltzman and Jackson argue that the common-law fraud claim must nevertheless be dismissed, both because there could be no reasonable reliance and because the fraud is not plead with sufficient particularity. Neither argument is meritorious.

1.

The Agreement contains an integration clause that reads, in relevant part, as follows: "This agreement is the complete and exclusive statement of the agreement between the parties and supersedes all prior agreements and communications with respect to the subject matter ...." (Agreement, § 13, attached to amended complaint).[9] The Agreement also contains a disclaimer that reads as follows:

> Except as expressly stated in other Sections of Schedules also entitled "WARRANTY," there are no warranties, express or implied ... of any item or service furnished under or in connection with this Agreement. RENAISSANCE DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. No representations or affirmation of fact, including, but not limited to statements regarding suitability for use or performance, whether made by Renaissance personnel or otherwise, shall be deemed to be a warranty by Renaissance for any purpose or give rise to any liability of Renaissance whatsoever unless contained in this agreement....

(Agreement, § 5). The individual defendants' chief argument is that the presence of this integration clause and disclaimer forecloses the possibility that Whitney could have reasonably relied on precontractual representations that were not contained in the contract.

Reasonable reliance and materiality are questions of fact, and therefore not generally a viable basis for a Rule 12(b)(6) dismissal. *See Arlington Fin. Corp. v. Ben Franklin Bank of Illinois*, No. 98 C 7068, 1999 WL 286080, at *4 (N.D. Ill. Apr. 29, 1999) (reasonable reliance is a question of fact); *Jernryd v. Nilsson*, No. 84 C 7551, 1986 WL 13750, at *6 (N.D. Ill. Dec. 4, 1986) (materiality and reliance questions of fact); *Thompson v. IFA, Inc.*, 536 N.E.2d 969, 973 (Ill. App. Ct.1st Dist. 1989) (materiality a question of fact). Moreover, cases applying Illinois law generally hold or imply that the mere presence of an integration clause does not automatically preclude a finding of fraud in the inducement. *See,*

[9]Written instruments attached to the compliant are properly considered in a Rule 12(b)(6) motion, and attaching such documents does not convert the motion to a motion for summary judgment. *See* Fed. R. Civ. P. 10(c); *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431-32 (7th Cir. 1993).

e.g., Budget Rent A Car, 1997 WL 201549, at *3 (claims for fraud are precluded only when "the oral fraud was discoverable by reading the terms of the contract"); *cf. Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1207 (7th Cir. 1998) ("A party who could have discovered the fraud by reading the contract, and in fact had an opportunity to do so, cannot later be heard to complain that the contractual terms bind her"); *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 569-70 (7th Cir. 1995) (same); *Runnemede Owners, Inc. v. Crest Mortgage Corp.*, 861 F.2d 1053, 1059 (7th Cir. 1988) (stating that experienced businessmen should proceed "with caution when confronted with oral representations inconsistent with the written terms of [a] contract" and holding that plaintiff could not establish reasonable reliance as a matter of law when the contract directly contradicted the alleged oral misrepresentations).

These cases stand for the proposition that a party cannot claim that it reasonably relied on precontractual representations if that party could have discovered the misrepresentation by reading the contract. More specifically, they indicate that reliance on precontractual fraud statements is precluded as unreasonable only where the contract "flatly contradicts" them. *Cf. Regensburger*, 138 F.3d at 1208 (holding that plaintiffs could not establish reasonable reliance when contract "explicitly" contradicted precontractual promises); *Pierce*, 65 F.3d at 567, 570 (plain terms of release flatly contradicted oral explanation of the meaning of release terms); *Runnemede*, 861 F.2d at 1059 (noting that one of the representations was "directly contrary to the specific limiting terms of the ... written contract"). Indeed, as one commentary has observed:

> Illinois law has long held that where a defendant makes a statement ... within [his] knowledge, and the statement is not so improbable as to cause doubt of its truth, a plaintiff may rely on the

> statement, even though the means of investigation were within the reach of the plaintiffs and the parties were adversarial.
>
> However, where a plaintiff either knows about the fraudulent misrepresentation or possesses a state of mind equivalent to such actual knowledge, the cases are clear that such a plaintiff has not justifiably relied....
>
> ... [Moreover,] [w]here the defendant is accused of ... intentional fraud, the better reasoned cases in Illinois do not consider the mere negligence of the plaintiff ... as sufficient reason to negate the plaintiff's reliance.

1 MICHAEL J. POLELLE & BRUCE L. OTTLEY, ILLINOIS TORT LAW §§ 9.18-19 (2d ed. 1999) (citation omitted).

Messrs. Saltzman and Jackson ask the Court to go farther, and to find that due to the presence of an integration clause, Whitney could not reasonably rely on any alleged representations not included in the Agreement. *See* Saltzman Mem. 18 ("Had Whitney intended to rely on any representations regarding the performance or attributes of the Renaissance software product, it would have required that those representations be set forth in the Agreement."). The Court believes this argument stretches the effect of integration clauses too far.

An integration clause such as the one here only tells a contracting party that it may not consider statements other than those set forth in the contract as part of "the agreement." Likewise, a warranty disclaimer tells a contracting party that extra-contractual statements are not part of the agreement. However, these expressions of the metes and bounds of the contract do not on their face purport to tell a party that any unincorporated precontract statements are incorrect, or that by agreeing to an integration clause or a warranty disclaimer a party is waiving fraud claims based on unincorporated precontract statements. Indeed, because of the ubiquity of such clauses, such a rule would in substance require a

contracting party to expressly preserve a claim for fraudulent inducement, and would allow a party to contract out of fraud claims by implication. Given the long-standing acceptance of fraud in the inducement claims under Illinois common law, this Court believes that the Illinois Supreme Court would not adopt the view espoused by defendants, and thus follows the line of cases that has rejected it. *See, e.g., Budget Rent A Car Corp.*, No. 96 C 0944, 1997 WL 201549 at *3 ("[T]he mere presence of an integration clause does not except this case from the doctrine that 'parol evidence is always admissible to prove a fraud' antecedent to a contract.") (*quoting Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1068-69 (7th Cir. 1992)).

The Court is mindful that some recent cases applying Illinois law have stated that a party cannot reasonably rely on precontractual oral misrepresentations when the contract contains a clear and unambiguous integration clause. *See, e.g., Worldcom Network Servs., Inc. v. UMG Communications Groups, Inc.*, No. 97 C 5867, 1998 WL 341830, at *4 (N.D. Ill. June 4, 1998) (granting motion to dismiss on common-law fraud claim based on oral precontractual representations because party could not rely on such misrepresentations when contract contained an unambiguous integration clause); *Barille v. Sears Roebuck & Co.*, 682 N.E.2d 118, 123 (Ill. App. Ct. 1st Dist. 1997) (dismissing fraud claim and holding that clear merger clause foreclosed reasonable reliance on alleged oral misrepresentations as matter of law). In each of those cases, the claims appear to have been subject to dismissal for the independent reason that they were based on promises of future events, which are not generally actionable in fraud under Illinois law. *See Media Communications, Inc. v. Multimedia, Sign Up, Inc.*, 99 C 5009, 1999 WL 1212652, at *1-2 (N.D. Ill. Dec. 14, 1999) (actions for promissory fraud not generally actionable absent "scheme or device" to defraud); *see also* 1 POLELLE & OTTLEY § 9.27. To the extent that *Worldcom* and

Barille stand for the proposition that the presence of an integration clause always forecloses the possibility of fraud in the inducement, this Court respectfully disagrees that those cases reflect prevailing Illinois law. The Court instead applies the well-settled proposition under Illinois law that Whitney may not premise a fraudulent inducement claim or statements that would be disclosed as false by reading the Agreement. The Court will not go further, and thus rejects defendants' invitation to bar a claim of reasonable reliance on statements that are not incorporated into a contract merely because it has a general integration clause and warranty disclaimer.

The Court finds that the amended complaint plainly alleges at least some actionable misrepresentations that would not have been revealed by reading the Agreement. By way of example, the amended complaint alleges that Mr. Jackson falsely represented to Whitney that there were no problems existing between Messrs. Jackson and Saltzman that would hinder the successful completion of the project, and that Mr. Jackson falsely informed Whitney that Renaissance "strictly followed an industry accepted project management process" (Count IV, ¶ 7(I)). Such statements could be alleged misrepresentations of material fact that Whitney claims Messrs. Jackson and Saltzman knew were false, upon which Messrs. Jackson and Saltzman intended Whitney to rely, and upon which Whitney did reasonably rely to its detriment. *See, e.g.*, *Budget Rent A Car*, 1997 WL 201549, at *6-7.[10] Consequently, the individual

[10]In *Budget Rent-A Car*, the Court stated that when a contract clearly disclaims "any assurance concerning the capabilities of the system," a party cannot rely on such assurances made prior to contracting. 1997 WL 201549, at *3. The Court expresses no view at this time as to whether this holding accurately states Illinois law, or whether if so, Article 5 of the Agreement is of the kind that would bar reliance on precontractual statements regarding the software capabilities.

defendants' arguments that Whitney's fraud claims must be dismissed for its failure to allege statements that could support reasonable reliance is denied.[11]

2.

Messrs. Jackson and Saltzman also argue that Whitney's fraud claim must be dismissed because it fails to allege fraud with particularity. Mr. Jackson argues that the complaint is deficient because it "fails to allege where Mr. Jackson made the alleged false misrepresentation" (Jackson's Mem., at 15).

> That argument is patently without merit. Rule 9(b) is satisfied when the plaintiff sets forth the
>
> time, place and substance of the allegedly false representations, as well as the identity of the individual making the representations. The allegations are sufficient if the defendant is in a position to understand the nature of the conduct from which the plaintiff has drawn the inference of fraud and can defend against the allegations.

Douglas v. Tonigan, 830 F. Supp. 457, 461 (N.D. Ill. 1993) (*quoting Schaps v. R.A. Transport. Servs., Inc.*, No. 86 C 4582, 1987 WL 12178, at *3 (N.D. Ill. June 5, 1987)). The amended complaint contains more than enough information to satisfy Rule 9(b) as to Mr. Jackson: it identifies the date on which the misrepresentations allegedly occurred,[12] the parties to the conversation, and the substance of the representations. Moreover, the affidavit submitted by Thomas Murray, which may be used to supplement

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[11]Similarly, the argument that the presence of an integration clause precludes a finding of intent is also without merit. Indeed, a case cited by the individual defendants undermines that argument. *Cf. Turner v. Johnson & Johnson*, 809 F.2d 90, 96 (1st Cir. 1986) ("'In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement.... To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of law'") (quoting *Bates v. Southgate*, 31 N.E.2d 551, 558 (Mass. 1941)). The individual defendants' argument that Whitney cannot establish loss causation is without merit.

[12]The amended complaint alleges that many of the misrepresentations occurred on or about January 7, 1998 (Count IV, ¶ 7A-7N). As Whitney observes, the failure to give the precise date is not fatal to Whitney's fraud claim. *See, e.g., Budget Rent A Car Corp. v. Genesys Software Sys., Inc.*, No. 96 C 0944, 1996 WL 480388, at *3 (N.D. Ill. Aug. 22, 1996).

the amended complaint when considering the motion to dismiss, *see Hentosh*, 167 F.3d at 1173 n.3, makes it clear that the conversations took place at Whitney's offices in Illinois (Murray Aff. ¶ 5). These allegations plainly allow Mr. Jackson to understand what conduct is allegedly fraudulent.

The analysis is only slightly different as to Mr. Saltzman. Rule 9(b) is clearly satisfied as to Mr. Jackson, and the amended complaint attempts to hold Mr. Saltzman liable for Mr. Jackson's conduct as a result of their alleged joint participation in a fraudulent scheme (Count X, ¶ 20), whereby Mr. Saltzman allegedly was involved in and/or approved Mr. Jackson's statements (*id*. ¶ 18). Thus, there is no doubt what fraudulent conduct is alleged against Mr. Saltzman. However, Mr. Saltzman argues that for him to be liable under Illinois law, he must "have participated in the conduct giving rise to that liability" and that Whitney's fraud claims must fail because Whitney "fails to allege participation by Saltzman with the specificity required to withstand a motion to dismiss" (Saltzman Reply Mem., at 12). Thus, Mr. Saltzman's real argument is that the allegations of a "conspiracy" are too vague to satisfy Rule 9(b).

Although Rule 9(b) does not, on its face, apply to claims of civil conspiracy, some cases hold that claims of civil conspiracy must be pled with particularity. *See, e.g., Cohabaco Cigar Co. v. United States Tobacco Co.*, No. 98 C 1580, 1998 WL 773696, at *6-7 (N.D. Ill. Oct. 30, 1998); *Morgan v. Gtech Corp.*, No. 90 C 238, 1990 WL 251900, at *3-4 (N.D. Ill. Dec. 19, 1990). However, "[f]air notice is the basic consideration underlying Rule 9(b); the plaintiff who pleads fraud must 'reasonably notify the defendants of their purported role in the scheme.'" *Newscope Tech., Ltd. v. Ameritech Info. Indus. Servs., Inc.*, No. 99 C 52, 1999 WL 199650, at * 7 (N.D. Ill. April 5, 1999) (quoting *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1020 (7th Cir. 1992)); *see also* 5 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1298, at 648 (2d ed. 1990) ("Perhaps the most basic consideration in making

a judgment as to the sufficiency of a pleading is the determination of how much detail is necessary to give adequate notice to an adverse party and enable him to prepare a responsive pleading.").

In this case, a fair reading of the amended complaint reveals that it is adequate to put Mr. Saltzman on notice that he is alleged to have participated in a scheme to defraud Whitney, and that he participated in and/or approved of Mr. Jackson's alleged misstatements. Whitney, it is true, does not allege the specific arrangements between Messrs. Jackson and Saltzman; nor could it reasonably be expected to do so, absent discovery. However, the lack of those particular details is not fatal to Whitney's claim -- Rule 9(b)'s requirements "may be relaxed when specific details are within the defendants exclusive knowledge or control." *Petri v. Gatlin*, 997 F. Supp. 956, 974 (N.D. Ill. 1997).

Indeed, this Court observes that Whitney's allegations are more specific than those contained in either *Cohabaco* or *Gtech*, and provide at least as much detail as the allegations in *Sears, Roebuck & Co. v. Malony*, No. 97 C 7165, 1998 WL 214689, at *5 (N.D. Ill. Apr. 22, 1998), which survived a motion to dismiss. Because the amended complaint contains sufficient detail to inform both Messrs. Jackson and Saltzman of their particular roles in the alleged common-law fraud, it is pled with adequate particularity. Their motion to dismiss the common-law fraud claim is denied.

B. ICFA

Messrs. Saltzman's and Jackson's attempt to dismiss the statutory fraud claim fares no better. A plaintiff suing under the ICFA need not allege all of the elements of common-law fraud. *See Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.,* 946 F. Supp. 1358, 1369; *see also* James R. Keller, *Illinois Consumer Fraud Act: A Primer on Recent Developments*, 87 ILL. B.J. 474, 474-75 (1999) (observing that the Act is "a shortened version of common law fraud" and does not require the plaintiff to prove

reliance). To state a claim under the ICFA, a plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) that the deception occurred in a course of conduct "involving trade or commerce"; and (4) that the plaintiff's injuries were proximately caused by the deceptive conduct. *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 593 (Ill. 1996). The plaintiff's reliance is not an element of the claim, but an ICFA claim must be pled with the same particularity as common-law fraud. *See DeLeon v. Beneficial Constr. Co.*, 55 F. Supp. 2d 819, 825 (N.D. Ill. 1999).

Most of the individual defendants' challenges to this claim may be rejected summarily.[13] As with the common-law fraud claim, Messrs. Saltzman and Jackson challenge Whitney's ICFA count on the grounds that it is not pled with particularity, an assertion that the Court rejects for the same reasons discussed above. Likewise, Messrs. Saltzman's and Jackson's claim that Whitney cannot establish material misrepresentations, proximate cause, or an intent to induce reliance on those alleged misrepresentations is bottomed on the argument that Whitney cannot base a fraud claim on statements not incorporated into the Agreement, an argument the Court has already discussed and rejected.[14] And, there is no doubt that Whitney has, in fact, pled these elements (*see* Count X). Moreover, the defendants do not challenge that the conduct in question involved "trade or commerce" as defined in the Act.

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[13]The Court notes in passing that Renaissance did not seek to dismiss the ICFA claim or raise as affirmative defenses any of the challenges to it asserted by Messrs. Jackson and Saltzman -- even though Mr. Saltzman and Renaissance are represented by the same counsel.

[14]*L.R.J. Ryan v. Wersi Elec. GmbH & Co.*, 59 F.3d 52, 54 (7th Cir. 1995), is not to the contrary. That case can be read for the proposition that alleged precontractual promises that are flatly contradicted by material in the contract, or promises of future events as opposed to existing fact, cannot be "material" under the ICFA.

However, Messrs. Saltzman and Jackson make an additional argument worthy of more extended discussion, namely, that Whitney's claim under the ICFA must be dismissed because, as a business-plaintiff, Whitney was required (but failed) to allege that the defendants' conduct involved "trade practices addressed to the market generally or otherwise implicated consumer practice concerns" (Saltzman Mem. at 10).[15] There appears to be a split in authority as to whether businesses seeking relief under the ICFA must make such allegations. One line of cases seemingly requires business plaintiffs to allege conduct by the defendant implicating consumer protection concerns. *See, e.g., Cold Spring Granite Co. v. Information Management Assocs., Inc.,* No. 99 C 6690, 1999 WL 1249337, at *3-4 (N.D. Ill. Dec. 17, 1999); *Newscope Tech., Ltd. v. Ameritech Info. Indus. Servs., Inc.*, No. 99 C 52, 1999 WL 199650, at *8 (N.D. Ill. Apr. 5, 1999); *Central Diversey M.R.I. Ctr., Inc. v. Medical Management Sciences,* Inc., 952 F. Supp. 575, 577 (N.D. Ill. 1996); *Scarsdale Builders, Inc. v. Ryland Group, Inc.*, 911 F. Supp. 337, 340-41 (N.D. Ill. 1996); *Lake County Grading Co. v. Advanced Med. Contractors*, 654 N.E.2d 1109, 1115 (Ill. App. Ct. 2d Dist. 1995). Another line of cases does not -- at least when the business itself is a "consumer" of the defendant's goods or services. *See, e.g., Petri v. Gatlin*, 997 F. Supp. 956, 968 (N.D. Ill. 1997); *Lefebvre Intergraphics,* 946 F. Supp. at 1369; *Skyline Inter'l. Dev.*

[15]Mr. Saltzman also makes the related argument that Whitney is not a "consumer" of *Mr. Saltzman*, and thus cannot establish an ICFA claim against him without pleading a "consumer nexus"(Saltzman Reply Mem. at 7-8). To the extent that Messrs. Saltzman and Jackson argue that they cannot be liable because Whitney was, at best, a consumer of Renaissance rather than a consumer of their goods or services, that argument is a non-starter. The plain language of the Act states that "[a]ny *person* who suffers actual damage as a result of a violation of this Act committed by any other *person* may bring an action against such other *person*," 815 ILCS 505/10a (emphasis added), and defines the word "person" to include any "business entity or association, and any agent, employee, ... partner, officer, director, [or] member ... thereof." 815 ILCS 505/1 §1(c). *See also Reese v. Hammer Fin. Corp.*, No. 99 C 0716, 1999 WL 1101677, at *5 n.5 (N.D. Ill. Nov. 30, 1999); *DeLeon*, 998 F. Supp. at 865-66; *People ex rel. Hartigan v. All Am. Aluminum & Constr. Co.*, 524 N.E.2d 1067, 1070 (Ill. App. Ct. 1st Dist. 1988).

v. Citibank, F.S.B., 706 N.E.2d 942, 946 (Ill. App. Ct. 1st Dist. 1998); *Law Offices of William J. Stogsdill v. Cragin Fed. Bank for Savs.*, 645 N.E.2d 564, 566-67 (Ill. App. Ct. 2d Dist. 1995).

In light of this apparent split, and in the absence of any guidance from the Illinois Supreme Court, or binding authority from the Seventh Circuit, this Court must determine how the Illinois Supreme Court would rule if presented with this issue.[16] *Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 466 (7th Cir. 1997). As with any question of statutory construction, the best place to start is with the language of the Act itself, *see In re Application of the Cook County Collector of DuPage County for Judgment for Delinquent Taxes for the Year 1992*, 692 N.E.2d 264, 267 (Ill. 1998), and so that is where we begin.

The Act declares unlawful, in sweeping terms, all "[u]nfair methods of competition and unfair or deceptive acts or practices" in the course of "trade or commerce." 815 ILCS 505/2 (West 1999). "Trade or commerce" is very broadly defined. 815 ILCS 505/1 §1(f). The Act is likewise sweeping in its grant of the right to sue to enforce its terms. The Act establishes a private cause of action for any "person" who suffers injury as a result of a violation of the Act. 815 ILCS 505/10a. "Person" is broadly defined as well -- expressly including corporations. 815 ILCS 505/1 §1(c). Moreover, consumer is defined in the ICFA as *any* person "who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his ... business but for his use or that of a member of his household." 815 ILCS 505/1 §1(e). "Merchandise" is broadly defined, and includes intangibles. 815 ILCS 505/1 §1(b).

[16]Before proceeding with this analysis it is worth observing that the "split" is more apparent than real because most of the courts holding that a business must allege a "consumer nexus" before seeking protection under the ICFA were never faced with facts that established that the plaintiff-business was a "consumer" under the Act. *See infra*.

Numerous sections of the Act require a plaintiff to be a consumer as defined by the Act. *See Scarsdale Builders*, 911 F. Supp. at 340 n.7. Yet, significantly, Section 501/10a does not impose such a limitation, or a general requirement that a plaintiff show a "consumer nexus," except in a suit against a new or used vehicle dealer, in which case Section 505/10a specifically requires "proof of a public injury . . . or . . . effect on consumers." 815 ILCS 505/10a. The fact that the Illinois Legislature selectively (and expressly) imposed a "consumer" or "consumer nexus" requirement on some causes of action, but not others, is evidence that the Legislature was purposeful in its action, and did not intend to impose the requirement where the statutory language does not provide for it. *See Bridgestone/Firestone, Inc. v. Aldridge*, 688 N.E.2d 90, 95-96 (Ill. 1997); *Scarsdale Builders*, 911 F. Supp. at 340 n.7.

This Court also observes that the Act was intended to be broadly applied. The ICFA is "regulatory and remedial statute intended to protect consumers, borrowers and *business persons* against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Cripe v. Leiter*, 703 N.E.2d 100, 102 (Ill. 1998) (emphasis added); *see also Scarsdale Builders*, 911 F. Supp. at 338 (the full title of the Act states "that it is '[a]n Act to protect consumers and borrowers and businessmen, against fraud, unfair methods of competition and unfair or deceptive acts or practices'") (*quoting* 815 ILCS 505/1 (West 1999) (Historical and Statutory Notes)). Thus, looking at the statutory language and broad purpose of the Act, it would not appear that the Illinois Legislature intended to require a business seeking relief to be a "consumer" or to allege a "consumer nexus."

Moreover, even if the legislative intent was to limit standing to sue to these plaintiffs who are "consumers," Whitney here fits that bill. The statutory language contemplates that a business may be a consumer: a consumer is defined to include "persons," which in turn includes corporations. Moreover,

Whitney is a "consumer" as defined under the Act because Whitney did not purchase merchandise for resale in the ordinary course of its business. *See, e.g., Lefebvre Intergraphics, Inc.,* 946 F. Supp. at 1369; *Skyline Inter'l. Dev.,* 706 N.E.2d at 946; *Law Offices of William J. Stogsdill,* 645 N.E.2d at 566-67. Implicit in the individual defendants' argument is the notion that "consumer" should be construed to exclude businesses altogether. In the Court's view, that argument reflects a policy judgment that does not find expression in the statutory language. Under a reading of the ICFA that is consistent with the statutory language, Whitney is a consumer and properly may bring this action.

We recognize that, uncomfortable with the broad sweep of the ICFA, some courts have been reluctant to give the statute its literal construction.

> Illinois courts have always been keenly aware that if no limiting construction were given the Act's coverage, it could supplant common law jurisprudence to an unjustified extent--a result that the courts do not view as having been intended by the Illinois General Assembly.

Scarsdale Builders, 911 F. Supp. at 340. Cases such as *Scarsdale Builders* reflect an effort to reconcile the language of the Act with the more limited purpose that courts believe the Illinois Legislature must have intended.

Those courts have arrived at a limiting articulation of the ICFA when businesses bring suit: "[d]isputes between businessmen over a contract generally are not covered by the Illinois Consumer Fraud Act unless the breach implicates consumer protection concerns." *Newscope Tech., Ltd.*, 1999 WL 199650, at *8; *see also Athey Prods. Corp. v. Harris Bank Roselle,* 89 F.3d 430, 436-37 (7th Cir. 1996) (stating that Illinois courts "have uniformly held that claims under the Act must meet the consumer nexus test by alleging that the conduct involves trade practices directed to the market generally or otherwise implicates consumer protection concerns"); *Industrial Specialty Chems., Inc. v. Cummins Engine Co.,*

Inc., 902 F. Supp. 805, 812 (N.D. Ill. 1995) ("[I]t is well established that plaintiffs need not actually be 'consumers;' businesses have standing to bring actions under the Act as well. However, when the dispute involves two businesses, 'the test for standing is whether the conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns.'") (quoting *Gadson v. Newman*, 807 F. Supp. 1412, 1421 (C.D. Ill. 1992)). Defendants invoke these cases in an attempt to argue that Whitney does not have standing to sue under the ICFA.

The Court has doubts about this disinclination to believe that the Illinois Legislature meant what it said when it passed the ICFA. Of course, it is an accepted principle that a statute should be construed to avoid untoward or absurd results. *See Borden Chems. & Plastics, Ltd. v. Zehnder*, No. 1-98-4456, 2000 WL 157535, at *10 (Ill. App. Ct. 1st Dist. Feb. 14, 1000) (slip op.). At the same time, when employing such a construction, a court must take care to avoid results that the Legislature could not have intended -- not merely results the court may deem unwise. *See Bridgestone/Firestone, Inc.*, 688 N.E.2d at 96.

Accepting that if presented with the question, the Illinois Supreme Court would endorse some limitation on the plain language of the ICFA to prevent it from, *sub silentio*, supplanting Illinois common-law fraud, does not resolve the question at hand in this case: whether Whitney, as a consumer defendant Renaissance's products, can claim the protection of the Act without alleging some distinct "consumer nexus." We believe the answer is yes. To the extent the ICFA may sweep more broadly than the Illinois Legislature intended, that over breadth is not limited to business-plaintiffs. If Whitney is a "consumer" within the meaning of the Act, then that is all the "consumer nexus" that is needed. Non-business plaintiffs are not required to plead a separate consumer nexus, and neither the language nor the purpose of the ICFA

creates different rules for different classes of consumers: one for business consumers, one for other consumers. Whitney alleges that it entered into an agreement whereby it would acquire goods and services from Renaissance. In light of the language of the Act, and the mandate to interpret it liberally, *see* 815 ILCS 505/11a, this Court holds that Whitney has standing to sue under the ICFA.

The vast majority of the cases cited by defendants simply do not address situations where, as here, the business plaintiff was a "consumer" of the defendant's goods or services. *See Athey Prods. Corp.*, 89 F.3d at 432-33 (plaintiff was not a consumer of defendant bank, which had extended credit to one of plaintiff's customers); *Scarsdale Builders, Inc. v. Ryland Group, Inc.,* 911 F. Supp. at 339 (purchaser of Illinois real estate not a consumer as defined by the Act); *Industrial Specialty Chems., Inc.*, 902 F. Supp. at 807-08 (plaintiff was the supplier of products to defendant); *Web Communications Group, Inc. v. Gateway 2000, Inc.*, 889 F. Supp. 316, 318 (N.D. Ill. 1995) (plaintiff marketed defendant's products); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 35 (Ill. App. Ct. 2d Dist. 1989) (plaintiff car dealer not a consumer of defendant car dealer) *Lake County Grading Co.*, 654 N.E.2d at 1112 (plaintiff subcontractor not a consumer of defendant-contractors's goods or services).

In contrast, in those cases where the business-plaintiff was a consumer of the defendant's goods or services, the courts have been virtually uniform in holding that the business had standing under the ICFA. *See, e.g., Petri*, 997 F. Supp. at 968-69; *Lefebvre Intergraphics, Inc.*, 946 F. Supp. at 1369; *Skyline Inter'l. Devel.*, 706 N.E.2d at 946; *Law Offices of William J. Stogsdill*, 645 N.E.2d at 566-67.[17] This

[17]Mr. Saltzman argues that three "recently decided cases have each found that the implication of consumer protection concerns was required even when the plaintiff was a consumer of defendant's products or services." Saltzman Reply at 6 (citing *Cold Spring*, 1999 WL 1249337; *Newscope*, 1999 WL 199650; and *Brody v. Finch Univ. of Health Sciences*, 698 N.E.2d 257 (Ill. App. 2d Dist. 1998)). This Court respectfully disagrees that the conclusions in those cases reflect what the Illinois Supreme Court would hold if confronted with the issue, and thus declines to follow them.

Court chooses to follow this latter group of cases, and holds that Whitney has standing to seek relief under the ICFA.

IV.

As an alternative argument, Messrs. Saltzman and Jackson claim that the case should be transferred to the District of Massachusetts pursuant to 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." As a predicate to any transfer under Section 1404(a), it must first be established that venue is proper in the transferor court. *See Brandon*, 42 F. Supp. 2d at 833. Inasmuch as Messrs. Saltzman and Jackson also both challenge the propriety of venue in this Court, we first address the question of venue before turning to the issue of transfer.

A.

Venue is proper in any district "in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2). "[O]ne of the central purposes of statutory venue is to ensure that a defendant is not 'haled into a remote district having no real relationship to the dispute.'" *Pepsico, Inc. v. Marion Pepsi-Cola Bottling Co.*, No. 99 C 3939, 2000 WL 263973, at *6 (N.D. Ill. Mar. 6, 2000) (slip. op.) (quoting *Selzer v. County of Allegan*, No. 98 C 4120, 1998 WL 749436, at *5 (N.D. Ill. Oct. 23, 1998)). A defendant's conduct must have a substantial connection with the district, and a substantial connection "is established by showing a 'real relationship to the dispute'" that is neither attenuated or tangential. *Id*. (quoting, *Towbridge v. Empire of Am. Realty Corp.*, 93 C 5507, 1995 WL 311425, at *4 (N.D. Ill. May 18, 1995)). The burden of establishing venue is on the plaintiff. *See id.*, at *3.

Under this authority, it is clear that Mr. Jackson's alleged misrepresentations, as well as the damages allegedly suffered by Whitney, were substantial parts of the events "giving rise" to the claims against Mr. Jackson. Further, it is alleged that those misrepresentations took place at Whitney's office in this district. There can be no serious question that the pleadings establish that venue is proper in this district as to Mr. Jackson.

Venue as to defendant Mr. Saltzman presents, once again, a somewhat more subtle issue. Mr. Saltzman argues that he did not commit any act in this district that constitutes a substantial part of Whitney's claim, and that he thus cannot be subject to venue in this district. As we have explained above, however, the amended complaint sufficiently ties Mr. Saltzman into the complained of acts by Mr. Jackson in Illinois, by alleging that they were involved together in a fraudulent scheme and that Mr. Saltzman participated in and/or approved Mr. Jackson's alleged misrepresentations made in this district. In other words, it is fair to infer from the amended complaint that Mr. Saltzman made the alleged misrepresentations to Whitney in this district, albeit through Mr. Jackson. On their face, under a straightforward reading of Section 139(a)(2) those allegations create venue in this district as to Mr. Saltzman since the misrepresentations and resulting harm to Whitney are undoubtedly substantial parts of Whitney's fraud and ICFA claims.

Mr. Saltzman argues that this theory is in substance a conspiracy theory of venue, which is foreclosed by *Emjayco v. Morgan Stanley & Co., Inc.*, 901 F. Supp. 1397, 1401 (C.D. Ill. 1995), which stated that "[e]xcept for some specialized venue provisions, the co-conspiracy theory of venue is invalid." *See also* 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3807 ("In criminal cases a charge of conspiracy is enough to make venue proper in any district in which any act in furtherance of the

conspiracy was committed by any of the conspirators. It is unclear to what extent there may be a similar doctrine in civil cases.") (citations omitted). The Court does not find *Emjayco* persuasive.

To begin with, the *Emjayco* decision, which involved claims of securities fraud, applied uncritically the dictum in *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953), casting doubt on the viability of co-conspirator venue under the antitrust laws, without considering whether that reasoning extends beyond the antitrust context. *Cf.* 15 CHARLES A. WRIGHT ET AL. § 3807 (co-conspirator venue is recognized in "civil cases involving securities laws," even though "it is now clearly established that in antitrust cases there is no conspiratorial theory of venue"). Moreover, the complaint in *Emjayco* does not appear to have alleged *any* actionable conduct in the forum district. The only act alleged was a single visit to the forum district for a meeting; there were no allegations about what that visitor said or did while there. *Emjayco*, 901 F. Supp. at 1400-01. Thus, the *Emjayco* Court's comments about the co-conspirator theory of venue appear to have been dictum, since venue would not have been proper under any theory.[18]

By contrast, several cases that have addressed the question have found venue proper under a so-called "co-conspirator theory." *See, e.g., McLaughlin v. Bradlee*, 599 F. Supp. 839, 845-46 (D.D.C. 1984) (venue is established as to conspirator when coconspirator commits overt act within district), *aff'd.*, 803 F.2d 1197 (D.C. Cir. 1986); *Sadighi v. Daghighfekr*, 36 F. Supp. 2d 267, 275-76 (D.S.C. 1999) (venue proper as to Florida defendants under civil conspiracy theory because injury to plaintiff in South Carolina was substantial part of the events giving rise to the claim of South Carolina plaintiff even though

[18]In *Sportmart, Inc. v. Frisch*, 537 F. Supp. 1254, 1257 (N.D. Ill. 1982), the court rejected plaintiffs' attempt to assert co-conspirator venue. However, that decision involved an antitrust case, as well as a situation where there was no personal jurisdiction established -- thus, the venue discussion was dictum as well.

conspiracy took place in Florida); *Delta Educ., Inc. v. Langlois,* 719 F. Supp. 42, 50 (D. N.H.1989) (holding that venue was proper in district of New Hampshire as to nonresident corporate defendants when acts in furtherance of civil conspiracy were committed by coconspirators within district). This Court chooses to follow the precedents established in *McLaughlin, Sadighi,* and *Langlois*. A central purpose of venue -- to ensure a defendant is not haled into a remote district without a relationship to the dispute -- is analogous to the central purpose of the requirements for personal jurisdiction under the long-arm statute: both are controlled by principles of fairness. While in some cases personal jurisdiction may exist while venue is improper (for instance, if the acts here had been committed in Illinois but outside the Northern District of Illinois), this is a case where the personal jurisdiction and venue analyses are virtually congruent. *Cf. Indianapolis Colts,* 34 F.3d at 412 (observing that when plaintiff suffered an alleged in-state injury caused by an out-of-state tortfeasor and the tortfeasor indirectly "entered" the state, so as to establish personal jurisdiction, "[i]t is as clear or clearer that venue is proper"). As the Court has already explained, the amended complaint sufficiently links Mr. Jackson's conduct in this district to Mr. Saltzman, and that conduct is central to the dispute in this case. The fact that Mr. Saltzman did not personally come to Illinois, but acted through Mr. Jackson, is no more dispositive for venue than for personal jurisdiction. *See Pilates, Inc. v. Pilates Inst., Inc.*, 891 F. Supp. 175, 182-83 (S.D.N.Y. 1995) (venue proper over corporate employee who had never been to New York because employee had advertised and solicited purchases of product that infringed plaintiff's trademark). These allegations establish that it is fair for this Court to exercise personal jurisdiction over Mr. Saltzman in Illinois; they also establish that it is fair for venue to rest in this district.

B.

Finally, defendants argue that even if venue is proper, this entire case -- or at least the claims against Messrs. Jackson and Saltzman -- should be transferred to the District of Massachusetts pursuant to 28 U.S.C. § 1404(a). Since venue is proper in this district, and assuming *arguendo* that it would be proper in the District of Massachusetts, this Court must consider the following factors in deciding whether to transfer venue: (1) the plaintiff's choice of forum, (2) the convenience of the parties, (3) the convenience of the witnesses, and (4) the interests of justice. *See American Stair Corp. v. Burgess Steel Prods. Corp.*, No. 99 C 4615, 1999 WL 1044833, at *1 (N.D. Ill. Nov. 16, 1999). The court should also consider other factors such as the accessibility of witnesses, the availability of compulsory process, the relative congestion of dockets, and "all other considerations of a practical nature that make a trial easy, expeditious and economical." *Id.* (quoting *Newcourt Linc Fin., Inc. v. Allwire, Inc.*, No. 96 C 5601, 1997 WL 119973, at * 2 (N.D. Ill. Mar. 14, 1997)); *see also Barnes v. Rollins Dedicated Carriage Servs., Inc.*, 976 F. Supp. 767, 768 (N.D. Ill. 1997). Defendant bears the burden of showing that the forum to which it seeks transfer is more appropriate than the forum chosen by plaintiff. *See College Craft Cos., Ltd. v. Perry*, 889 F. Supp. 1052, 1054 (N.D. Ill. 1995).

The individual defendants argue that this Court should transfer this case for essentially two reasons: (1) "the convenience of the parties and the witnesses strongly favor transfer;" and (2) the defendants will not be able to secure the attendance at trial of important witnesses (Saltzman Mem. at 8). In support of their arguments, the defendants assert that three (Renaissance, Jackson, and Saltzman) of the four parties reside in Massachusetts. They also state that since a number of key witnesses are no longer employed by Renaissance (as Renaissance is in the process of winding down its affairs), the defendants will have a

difficult time in securing their attendance at trial in Illinois (*Id.*; *see also* Saltzman Reply Mem. at 5). Whitney counters by observing that Renaissance has not moved to transfer – consequently it must wish to remain in this district. Thus, two parties, Whitney concludes, wish to remain in this district, and two wish to litigate in Boston (Whitney Mem. at 28). Whitney also counters that many of its witnesses are no longer employed by Whitney, and that it would consequently be difficult to secure their presence at a Boston trial (*Id.* at 28-29). Whitney notes that it, too, has numerous witnesses that would be required to travel great distances if the case was transferred.

This Court concludes that the arguments raised by the parties in regard to convenience of the witnesses and the availability of compulsory process do not strongly favor one side or the other. *See Fountain Mktg. Group, Inc. v. Franklin Progressive Resources, Inc.*, No. 96 C 2647, 1996 WL 406633, at *6-7 (N.D. Ill. July 16, 1996); *Clipp Designs, Inc.*, 996 F. Supp. at 769 (holding that transfer was not appropriate when it "would merely transform an inconvenience for one party into an inconvenience for the other party"). While a plaintiff's choice of forum is sometimes considered merely one factor in the transfer calculus, *see, e.g., Safety-Kleen Corp. v. Davis*, No. 98 C 4550, 1998 WL 748269, at *2 (N.D. Ill. Oct. 22, 1998), where -- as here -- plaintiff's chosen forum is also its home forum, that choice is entitled to substantial deference. *See Brandon*, 42 F. Supp. 2d at 833. This factor favors litigation in this district.

Finally, the Court notes that the interests of justice will be served if this case were to remain here. Relevant to this consideration are "(1) the relation of the community to the issue of the litigation; (2) the court's familiarity with applicable law; and (3) the congestion of the respective court dockets and the prospects for earlier trial." *Tingstol Co. v. Rainbow Sales, Inc.*, 18 F. Supp. 2d 930, 933 (N.D. Ill. 1998). Illinois certainly has an interest in this case, which seeks to vindicate the rights of an Illinois resident

in connection with fraud claims arising out of conduct alleged to have occurred here. Illinois law will govern at least some claims here (such as the ICFA claim). And as observed above, *see supra* II.A.2.b., the case will likely be resolved as quickly in this district as in the District of Massachusetts. Therefore, this Court finds that this case should remain in this district, and denies the motion to transfer.[19]

CONCLUSION

For all the foregoing reasons, the Court hereby denies Messrs. Jackson's and Saltzman's motions to dismiss or, in the alternative, to transfer in whole or part. This matter is set for a status conference on May 4, 2000 at 10:00 a.m. The parties are directed to submit to the Court by the close of business on May 2, 2000, a joint schedule for what expert and non-expert discovery will be required in this case (including an estimate of the number of depositions required and the locations where they will occur), and a proposal for a time period in which it will be done.

ENTER:

SIDNEY I. SCHENKIER
United States Magistrate Judge

Dated: April 19, 2000

[19]The individual defendants argue that if this Court finds that a transfer of the entire case is not warranted, it should transfer the case as to the two individual defendants. That argument lacks merit. Defendants essentially ask this Court to bifurcate the proceedings after finding that the case is best litigated in Illinois. Needless to say, the Court will not grant this request as it would greatly disserve the interests of justice, and the convenience of the parties, to have duplicative litigation pending in two courts hundreds of miles away.